

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance Under)	
47 U.S.C. § 160(c) from Application of)	
the ISP Remand Order)	

**SBC’S REPLY TO CORE’S OPPOSITION
TO SBC’S PETITION FOR RECONSIDERATION**

In its opposition, Core fails to address any of the substance of SBC’s Petition for Reconsideration. Instead, Core raises a fusillade of meaningless procedural challenges. The Commission should give short shrift to such diversions and, based on the merits, grant reconsideration of its *Core Forbearance Order*.¹

Core first argues that the Commission no longer has jurisdiction over this matter and therefore cannot grant reconsideration. Core’s argument is premised entirely on its claim that its petition for forbearance was deemed granted because the Commission did not release its *Core Forbearance Order* within the statutory timeline set forth in section 10 of the Act. This is the same argument advanced by Core in its *Complaint for Declaratory Ruling* before the D.C. Circuit, and SBC is confident that the Commission will defend the procedural validity of its *Core Forbearance Order* in that forum. Accordingly, SBC will thus not address those arguments here. Core’s filing of its opposition, however, certainly belies Core’s belief that the Commission no longer has jurisdiction over this matter. Indeed, Core’s arguments concerning the appropriate

¹ Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, *Order*, WC Docket No. 03-171, 19 FCC Rcd 20179 (2004) (“Core Forbearance Order”).

rules pursuant to which reconsideration petitions must be filed and the standards under which such petitions should be evaluated, while incorrect, demonstrate Core's acceptance that the Commission, does, in fact, have the power to reconsider its *Core Forbearance Order*.

Core's second argument is similarly misplaced. Core argues that SBC's Petition for Reconsideration is procedurally improper because it "relies on the Commission's rules for rulemaking."² As an initial matter, it is not entirely clear which of the Commission's procedural rules governing reconsideration apply in this case. By granting, *sua sponte*, forbearance from application of its growth cap and new markets rules as to the entire industry, the Commission's *Core Forbearance Order* is, in essence, a "repeal of a rule."³ And neither the Act nor Commission Rule 1.53 indicate that the reconsideration process in Commission Rule 1.429 is inapplicable in that instance.⁴ More fundamentally, the substantive standards for reconsideration—as well as the deadlines for filing a petition for reconsideration, *i.e.*, 30 days after public notice—under Commission Rules 1.106 and 1.429 are the same. Thus, whether SBC identified 1.429 or 1.106 in its petition as the proper rule is entirely irrelevant. Under either rule, the Commission can and must consider SBC's Petition for Reconsideration.

Finally, Core argues that "under the Act and the Commission's rules and orders, the Commission may only grant reconsideration in instances where new evidence of fact or law is

² *Core Opposition* at 3.

³ 47 C.F.R. § 1.401.

⁴ Nor does the Commission forbearance order relied upon by Core say that. Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h), *Order*, 18 FCC Rcd. 24648, FCC 03-297. In holding that the Commission resolves forbearance petitions "under the usual standards for agency adjudication," the Commission was referring in that order to evidentiary and legal interpretation standards for determining whether the three prongs of section 10 have been satisfied and thus forbearance should be granted or denied. That order says nothing about the applicability of the Commission's procedural rules generally, or its reconsideration rules in particular, to forbearance proceedings.

presented.”⁵ That proposition is not only absurd, but also patently false as a matter of fact and law. Although the Act provides that no evidence “shall be taken” on reconsideration other than “newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which . . . should have been taken in the original proceeding,”⁶ the Act in no way limits the Commission’s reconsideration authority to instances in which a party proffers evidence in support of a petition for reconsideration. To the contrary, the Act commits to the Commission’s “discretion” the power to grant reconsideration, “if sufficient reason therefor be made to appear.”⁷ It also directs that “[r]econsideration shall be governed by such general rules as the Commission may establish[.]”⁸

Consistent with the Act, the Commission has established rules and standards for granting reconsideration. Generally, the Commission will not grant reconsideration petitions that merely request to “go back over ploughed ground,”⁹ or “simply reiterate[] arguments previously considered and rejected[.]”¹⁰ The Commission will, however, grant reconsideration based upon either new evidence which warrants review of an order or material errors or omissions in the Commission’s original order.¹¹ Indeed, the very Commission decision relied upon by Core

⁵ *Core Opposition* at 7.

⁶ 47 U.S.C. § 405.

⁷ *Id.*

⁸ *Id.*

⁹ *Southwestern Bell Telephone Company v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999)(quoting *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282-84 (1987)).

¹⁰ *Landlinx Communications, Petition for Reconsideration of the Order on Reconsideration Affirming Call Sign WPMP955*, filed by the California State Automobile Association, *Second Order on Reconsideration*, 15 FCC Rcd 24932, DA 00-2850 ¶ 4 (Dec. 18, 2000).

¹¹ *See, e.g., Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules, Order on Reconsideration*, 16 FCC Rcd 5022, FCC 01-71 ¶ 18 (Feb. 22, 2001)(“Reconsideration is

contains this same standard.¹² Core is simply wrong that either the Act or Commission's rules limit reconsideration to the presentation of new facts or law. The Commission itself has made clear that it will grant reconsideration to correct material omissions or errors.

That is precisely the case here. As set forth in SBC's Petition for Reconsideration, the Commission's *Core Forbearance Order* was based upon substantial factual errors and omitted consideration of contrary evidence. Specifically, the Commission's assumption that dial-up minutes had declined since the *ISP Remand Order* was a material error of fact. As demonstrated by SBC in its Petition for Reconsideration, the evidence relied upon by the Commission in its *Core Forbearance Order* says nothing about the growth or decline of dial-up minutes. Moreover, the actual evidence in the record as to dial-up minutes demonstrates that the total number of dial-up ISP minutes now is substantially higher than it was when the Commission adopted those rules. This fact was highlighted by Qwest in its Comments on SBC's Petition for

warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action."); *Landlinx Communications* ¶ 4 ("Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."); Petitions for Reconsideration of the Second Report and Order; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service, Direct Broadcast Satellite, and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 14 FCC Rcd 19924, FCC 99-360 ¶ 7 (Nov. 19, 1999)("Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action."); Applications of D.W.S., Inc. For Renewal of License for Stations WDWS(AM)/WHMS-FM Champaign, Illinois, *Memorandum Opinion and Order*, 11 FCC Rcd 2933, FCC 96-65 ¶ 4 (Feb. 20, 1996)("Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.").

¹² Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, *Order on Reconsideration*, 16 FCC Rcd. 16544 (2001)("Reconsideration of a Commission decision is warranted only if the petitioner cites a material error of fact or law, or presents additional facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action.")

Reconsideration, in which Qwest identified in detail just some of the evidence in the record demonstrating that “ISP-bound traffic has actually increased dramatically in Qwest’s territory,” and, particular the contrast in the growth of dial-up minutes in states that have adopted a bill-and-keep compensation mechanism and those that have not.¹³ That record evidence—which was neither addressed by the Commission in its *Core Forbearance Order* or by Core in its opposition—is contrary to the lynchpin assumption upon which the Commission’s *Core Forbearance Order* is based. That evidence, moreover, plainly demonstrates that the risks of market distortions and regulatory arbitrage opportunities resulting from intercarrier compensation for ISP-bound traffic are greater now than they were when the Commission adopted its *ISP Remand Order*. The Commission’s *Core Forbearance Order* is thus based upon a material error of fact and warrants reconsideration.

More fundamentally, the Commission failed to address the fundamental incompatibility of its *Core Forbearance Order* and the principles underlying its *ISP Remand Order*. There is no logical basis to maintain, on the one hand, a policy of preventing regulatory arbitrage opportunities while simultaneously reviving the very compensation mechanism that the Commission has found causes such market distortions. The internal inconsistency of the Commission’s actions—which again Core never denies—further warrants reconsideration.

¹³ *Qwest Comments* at 2.

Tellingly, Core offers no substantive refutation to the merits of SBC's Petition for Reconsideration. Accordingly, for the reasons set forth in that petition, the Commission should reconsider its *Core Forbearance Order* and retain the growth cap and new markets rule established in its *ISP Compensation Order*. In the alternative, if the Commission eliminates the growth cap and new markets rule, the Commission should establish a lower rate for intercarrier compensation payments for ISP-bound traffic, if not for the entire industry, then at least for those CLECs that do not abide by the growth caps or new market rules.

Respectfully Submitted,

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